

**United States Department of Labor
Employees' Compensation Appeals Board**

M.C., Appellant

and

**DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
San Diego, CA, Employer**

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**Docket No. 17-1242
Issued: December 20, 2017**

Appearances:

*Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On May 16, 2017 appellant, through counsel, filed a timely appeal from a March 15, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has established employment-related permanent impairment of her left upper extremity warranting a schedule award.

FACTUAL HISTORY

On August 9, 2012 appellant, then a 53-year-old employment tax specialist/revenue agent, filed an occupational disease claim (Form CA-2) alleging that she sustained pain in her left shoulder due to carrying heavy paperwork to and from the office. She first became aware of her condition and its relationship to her federal employment on July 16, 2012. Appellant stopped work on July 16, 2012.

OWCP accepted that appellant sustained a sprain of the left shoulder and upper arm and disorder of the bursae and tendons in the left shoulder. It paid wage-loss compensation for intermittent wage-loss from work from October 22 to November 8, 2012.³ Appellant accepted a limited-duty job offer on November 14, 2012.

In a report dated January 9, 2014, Dr. Dayang Kim Mariena Jaya, a Board-certified internist, diagnosed left shoulder bursitis, impingement syndrome, and adhesive capsulitis. She discussed appellant's history of experiencing shoulder pain on July 12, 2012 carrying case files. Dr. Jaya noted that a magnetic resonance imaging (MRI) scan showed biceps tendinitis and subacromial bursitis. She found that appellant had reached maximum medical improvement and had no restrictions. Dr. Jaya further opined that appellant had no ratable impairment based on the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁴

Appellant, on May 9, 2016, filed a claim for a schedule award (Form CA-7).⁵ By letter dated May 11, 2016, OWCP requested that she submit an impairment evaluation from her attending physician addressing the extent of any employment-related impairment in accordance with the sixth edition of the A.M.A., *Guides*.⁶ No further information was provided.

By decision dated June 13, 2016, OWCP denied appellant's schedule award claim. It found that she had not submitted any medical evidence supporting a permanent impairment due to her accepted work injury.

On June 17, 2016 appellant, through counsel, requested a telephone hearing before an OWCP hearing representative.

³ OWCP also paid appellant for time lost from work for medical appointments from January 23 to September 4, 2013.

⁴ 5th ed. 2001.

⁵ By decision dated October 3, 2014, OWCP found that appellant had not established a recurrence of a medical condition.

⁶ 6th ed. 2009.

In an impairment evaluation dated June 22, 2016, Dr. Mesfin Seyoum, who specializes in family medicine, obtained a history of appellant experiencing the sudden onset of left shoulder pain on July 16, 2012 while carrying a “heavy briefcase on her left shoulder.” He reviewed the objective studies of record and discussed her current complaints of continued left shoulder pain aggravated by cold, overhead reaching, and lifting. Dr. Seyoum measured range of motion for the left shoulder and performed a neurological examination. He diagnosed a left shoulder strain and left rotator cuff syndrome “caused and aggravated by work activities,” noting that she had a specific injury to her left shoulder on July 16, 2012. Using Table 15-5 on page 402 of the A.M.A., *Guides*, 6th ed., Dr. Seyoum identified the diagnosis as a class 1 rotator cuff tear with residual loss. After applying grade modifiers, he determined that appellant had five percent upper extremity impairment.

During the telephone hearing, held on February 10, 2017, counsel requested that OWCP’s hearing representative remand the case for OWCP’s medical adviser to consider Dr. Seyoum’s impairment evaluation.

In a decision dated March 15, 2017, OWCP’s hearing representative affirmed the June 13, 2016 decision. She found that Dr. Seyoum did not provide an accurate history of injury and rated appellant for a rotator cuff tear, a condition not accepted by OWCP as employment related.

On appeal counsel contends that she submitted evidence supporting permanent impairment.

LEGAL PRECEDENT

FECA⁷ provides compensation for both disability and physical impairment. “Disability” means the incapacity of an employee, because of an employment injury, to earn the wages the employee was receiving at the time of injury.⁸ In such cases, FECA compensates an employee for loss of wage-earning capacity. In cases of physical impairment FECA, under section 8107(a), compensates an employee, pursuant to a compensation schedule, for the permanent loss of use of certain specified members of the body, regardless of the employee’s ability to earn wages.⁹

The claimant has the burden of proof to establish that he or she sustained a permanent impairment of a scheduled member or function as a result of her employment injury.¹⁰ The claimant must submit a rationalized medical opinion that supports a causal connection between his or her current condition and the employment injury.¹¹ The medical opinion must be based on

⁷ *Supra* note 2.

⁸ *Lyle E. Dayberry*, 49 ECAB 369 (1998).

⁹ *Renee M. Straubinger*, 51 ECAB 667 (2000).

¹⁰ *See Veronica Williams*, 56 ECAB 367 (2005); *Annette M. Dent*, 44 ECAB 403 (1993).

¹¹ *Manuel Gill*, 52 ECAB 282 (2001).

a complete factual and medical background with an accurate history of the claimant's employment injury and must explain from a medical perspective how the current condition is causally related to the injury.¹²

ANALYSIS

OWCP accepted appellant's August 9, 2012 occupational disease claim for a left shoulder and upper arm sprain and a disorder of the bursae and tendons of the left shoulder. Appellant returned to modified employment in November 2012.

On January 9, 2014 Dr. Jaya released appellant to resume her usual employment without restrictions. She diagnosed bursitis, impingement syndrome, and adhesive capsulitis of the left shoulder and found that she had no ratable impairment using the fifth edition of the A.M.A., *Guides*.

Appellant filed a schedule award claim on May 9, 2016, which OWCP denied on June 13, 2016 as she had not submitted an impairment evaluation in support of her claim. She requested a telephone hearing and submitted a June 22, 2016 impairment evaluation from Dr. Seyoum. Dr. Seyoum related that appellant had a history of left shoulder pain on July 16, 2012 carrying a heavy briefcase at work. He measured range of motion and performed a sensory examination. Dr. Seyoum diagnosed a left shoulder strain and left shoulder rotator cuff tendinitis due to employment activities, indicating that appellant experienced a left shoulder injury on July 16, 2012. Using Table 15-5 on page 402 of the sixth edition of the A.M.A., *Guides*, he identified the diagnosis as a class 1 rotator cuff tear and found, after applying grade modifiers, that she had five percent permanent impairment of the left upper extremity. Although Dr. Seyoum based his impairment assessment on a left shoulder rotator cuff tear, OWCP has not accepted the rotator cuff tear as employment related. It is appellant's burden to establish that the condition for which a schedule award is sought is causally related to her employment.¹³ Schedule awards are not issued when the impairment is caused solely by a nonemployment-related condition.¹⁴ Appellant has not established that the employment injury contributed to a permanent impairment of a scheduled member or function of the body.¹⁵ Consequently, she has failed to meet her burden of proof.

On appeal counsel asserts that she submitted sufficient evidence to demonstrate a permanent impairment. As noted, however, appellant has the burden of proof to establish a

¹² *Yvonne R. McGinnis*, 50 ECAB 272 (1999).

¹³ See *M.B.*, Docket No. 17-0376 (issued July 24, 2017); *Veronica Williams*, 56 ECAB 367 (2005).

¹⁴ See *M.B.*, *id.*

¹⁵ See *D.E.*, Docket No. 16-0463 (issued May 17, 2016).

permanent impairment as the result of the accepted work injury.¹⁶ She has not submitted such evidence and thus failed to meet her burden of proof.¹⁷

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that appellant has not established an employment-related permanent impairment of her left upper extremity, warranting a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the March 15, 2017 decision of the Office of Workers' Compensation Programs is affirmed.¹⁸

Issued: December 20, 2017
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

¹⁶ *Id.*

¹⁷ *See M.B., supra* note 13.

¹⁸ Colleen Duffy Kiko, Judge, participated in the original decision, but was no longer a member of the Board effective December 11, 2017.